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Supreme Court of the United States

October Term, 1958

No. 950

JOHN W. McGRATH CORPORATION,
Petitioner,

and

THE FIDELITY & CASUALTY COMPANY OF NEW YORK,
Petitioner,

against

THOMAS F. HUGHES, Deputy Commissioner, successor to JOHN A. WILLARD in the Second Compensation District of the United States Department of Labor, Bureau of Employees' Compensation,
Respondent,

and

ROSE D'ORNELLAS, Claimant,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

John W. McGrath Corporation and The Fidelity & Casualty Company of New York, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated and entered in the above entitled case on March 2, 1959.

Citations to Opinions Below

The Opinion of the United States Court of Appeals on affirmance of the judgment of United States District Court for the Southern District of New York, printed in Appendix A, pages 19-22, *infra*, is reported in 264 F. 2d 314.

The Opinion of the United States District Court for the Southern District of New York granting the motion of defendant Deputy Commissioner John A. Willard for summary judgment [illegible] printed in Appendix A, pages 23-26, *infra* has not yet been reported.

Jurisdiction

The Judgment sought to be reviewed was final in nature and was filed in the United States Court of Appeals for the Second Circuit with its Opinion and was entered on March 2, 1959. Although the questions presented to that court for review plainly concerned themselves with whether incompetent hearsay was substantial evidence enough to support essential administrative findings, that Court's Opinion by indirection only and without expressly conceding that any administrative findings were supported by hearsay alone,* has actually answered in the affirmative; and in these circumstances, no application was made for rehearing.

A certified copy of the Judgment of the United States Court of Appeals for the Second Circuit is attached to and constitutes part of the Certified Record. The time for filing this petition is computed from this Judgment entered March 2, 1959, and 90 days therefrom is May 31, 1959.

The jurisdiction of this Court is invoked under 28 United States Code Section, Section 1254 (1).

Questions

1. Was the Court of Appeals in error in contending that there was some evidence beyond the hearsay of the deceased employee D'Ornellas and the double hearsay attributed to another person to support the findings of the Deputy Commissioner that were essential to support his order and award, to wit, the findings of "navigable waters" jurisdiction under the Longshoremen's Act and of an "accidental injury arising out of and in the course of employment"? **

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* The Opinion of the Court of Appeals, however, will concede: "Perhaps this is not the result we would have reached had the case come before us de novo * * *."

** The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 (1927) codified in 33 U. S. Code Section 901 *et seq.*; here referred to as the Longshoremen's Act, requires for a compensation award that the jurisdiction situs of the injury be upon navigable waters and that the injury arises out of and in the course of employment. See page 12, *infra* and Appendix B, pages 27-29.

2. If there was additional evidence beyond the hearsay of the deceased D'Ornellas and the double hearsay of another person to support these necessary findings of the Deputy Commissioner, was this additional evidence anything more than the barest scintilla which should be disregarded under the "substantial evidence" standard of the Administrative Procedures Act?

3. If there was no additional evidence beyond the hearsay of the deceased D'Ornellas and the double hearsay of another person to support the findings of the Deputy Commissioner, were his findings justified because of the presumption that a claim comes within the provisions of the Longshoremen's Act?*

4. When essential administrative findings are in reality supported only by incompetent hearsay and there is circumstantial evidence to the contrary, can a Deputy Commissioner properly make a compensation order and award in favor of a claimant in the light of the requirement of Administrative Procedures Act that such order be supported by "substantial evidence" upon a review of the record as a whole?

5. Does not the rule of *Consolidated Edison of New York* v. *National Labor Relations Board*, 305 U. S. 197, 229-230 (1936), suggesting that under the constitutional standard of "due process" mere uncorroborated hearsay or rumor is not substantial evidence to support an administrative finding, which rule was expressly approved during the passage of the bill for an Administrative Procedures Act,** require that in this case the order and award of the Deputy Commissioner must be set aside?

6. Is the rule actually applied by the United States Court of Appeals for the Second Circuit to this case, to wit, that an administrative order and award is supported by

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* U. S. Code Section 903(a) provides for such a presumption. See Appendix B, page 28.

** See Appendix C, page 37, *infra*.

substantial evidence although the administrative findings of "navigable waters" jurisdiction and of an "accidental injury arising out of and in the course of employment" are really based upon bare hearsay, to be preferred to the rule of the United States Court of Appeals for the Ninth Circuit * that, to be supported by "substantial evidence", an administrative order and the administrative findings thereunder must be supported by more than uncorroborated hearsay?

Constitution and Statutes Involved

Amendment V of the Constitution of the United States; the portions of the Administrative Procedures Act, 60 Stat. 236 (1946), which are codified as Title 5, U. S. Code, Sections 1001(a) and (b), 1004(b), 1006(c), 1009(a) and (e) and 1011; the portions of the Longshoremen's Act, 44 Stat. 1424 (1927) which are codified as Title 33 U. S. Code, Sections 902(2), 903(a), 919(c) and (d), 920, 921(a) and (b), and 923(a). The texts of these are set out in Appendix B hereto, pages 27-31.

Statement of Facts

1. Preliminary Statement

The judgment of the United States Court of Appeals for the Second Circuit to be reviewed, affirmed the judgment of the United States District Court for the Southern District of New York dismissing the complaint of John W. McGrath Corporation and The Fidelity & Casualty Company of New York. The judgment of the United States District Court was entered upon an order granting the motion of defendant John A. Willard then Deputy Commissioner of the Second Compensation District of the

* *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 691 (9th Cir. 1949); *National Labor Relations Board* v. *Amalgamated Meat Cutters*, 202 F. 2d 671, 673 (9th Cir. 1953).

United States Department of Labor, Bureau of Workmen's Compensation.

The complaint filed April 4, 1957 by John W. McGrath Corporation and The Fidelity & Casualty Company of New York in this action had sought judicial review of the compensation order and award made by Deputy Commissioner John A. Willard in favor of Rose D'Ornellas, a claimant for compensation under the Longshoremen's Act as a widow of John D'Ornellas, deceased employee of petitioner John W. McGrath Corporation. The complaint alleged that said order and award and findings thereunder were erroneous and unsupported by substantial evidence and prayed that the order, award and findings be set aside and that other resonable relief be granted. Said compensation order and award was judicially reviewable under both the Longshoremen's Act * and the Administrative Procedures Act**. Claimant Rose D'Ornellas had also been named in the complaint as a party defendant but although served in this action never appeared either in the United States District Court for the Southern District of New York or in the United States Court of Appeals for the Second Circuit.

Inasmuch as John A. Willard was replaced as Deputy Commissioner in the Second Compensation District of the United States Department of Labor after appeal was taken to the United States Court of Appeals for the Second Circuit, his successor in that Compensation District, to wit, Deputy Commissioner Thomas F. Hughes was substituted as defendant Deputy Commissioner by order of the United States Court of Appeals for the Second Circuit.

The question of whether the order, award and findings of the Deputy Commissioner were erroneous and unsupported by substantial evidence as alleged in the complaint of petitioners makes it necessary to survey the evidence presented at the hearing before the Deputy Commissioner.

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* 33 U. S. Code Section 921(b), Appendix B, page 28.

** 5 U. S. Code Section 1009(a)(e), Appendix B, pages 30-31.

2. Evidence Presented at Hearings of Deputy Commissioner *

a) *Matters at issue and matters not in dispute.*

It was undisputed that John D'Ornellas, employee of petitioner McGrath Corporation whose duties were generally of a light nature as a sweeper and cleaner, collapsed at 8:45 A. M. on Monday, January 17, 1955 from a myocardial infarction while distributing coffee to his co-workers on Pier 9, North River, and was then taken to Beekman-Downtown Hospital and that 47 days later, after a period of convalescence following his discharge from the hospital, he died on March 5, 1955 as a result of myocardial infarction.

Petitioners disputed the following contentions of claimant Rose O'Ornellas which were adopted in the findings of the Deputy Commissioner, to wit, that John D'Ornellas was injured on or about Friday, January 14, 1955, at 3 P. M. when "while standing on a lighter at Pier 9, pulling the lighter by a line unassisted, he suffered unusual strain accompanied by a severe pain in the upper chest resulting in a coronary thrombosis which precipitated the myocardial infarction."

It is petitioners' contention that D'Ornellas was not on a lighter and was not pulling on a line on or about Friday, January 14th, but that he had been suffering extensive chest pain leading up to the myocardial infarction *throughout the week from January 10th to January 17th, 1955.*

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* Reference in this section of the Statement of Facts is made to the portions of the Record supporting the statements made herein. For example reference is made to the pages of the certified appendix filed in the Court of Appeals such as "(12a)"; to pages of the transcript of the hearing before the Deputy Commissioner annexed to that certified appendix such as (T12). to page numbers of the Deputy Commissioner's Exhibit as handed up to the Court of Appeals such as (Dep. Comr's. Ex. pp. 2, 4) and to other exhibits handed up to the Court of Appeals by letter or number, such as (Ex. 2).

b) *Evidence presented by claimant Rose D'Ornellas.*

Rose D'Ornellas testified that she was a nurse's aid (T9) who kept a bottle of nitroglycerine at home (T10) for her husband's chest pains (T8); that on Thursday, January 13th or Friday, January 14th, 1955, her husband John D'Ornellas came home looking terrible, and told her he had felt a chest pain while on a lighter pulling a line (T5-7); and that she kept him in bed from that time until the following Monday, taking time off to take care of him (T7). She also testified that *D'Ornellas was sick every night when he came home* (T7).

Dr. Texon testified that on January 22, 1955 John D'Ornellas told him of helping to pull a barge around a pier January 13th when he felt a severe chest pain (T22) but that he (Texon) had no information as to whether D'Ornellas was on a lighter at that time (T24). D'Ornellas told him that during his visit to the diabetic clinic of Kings County Hospital *on Monday January 10, 1955 he complained of numbness in his right arm and the right side of his chest* (T22).

Over objection (T16-19) a paper signed E. Kinnally dated May 27, 1955 was put in evidence, and it stated that Edward Canelli heard unidentified workers say that D'Ornellas had a heart attack on a lighter on January 14, 1955 and that he (Canelli) saw D'Ornellas later that day when he was able to walk (Ex. 2). Claimant's counsel said E. Kinnally was deceased (T18). The body of writing on that paper, which referred to the signatory as Edward Canelli was apparently written by some one other than the "E. Kinnally" who signed the paper (Ex. 2). The person who prepared the report set out on that paper—presumably an investigator who had been in the employ of claimant—was never produced at the hearing.

Dr. Cutler, claimant's medical expert on cross examination testified in effect that *a myocardial infarction which develops from a coronary thrombosis could be a "spon-*

taneous occurrence" (T80; T84-85). Upon direct examination he had testified in effect that if on January 13th or 14th D'Ornellas was pulling a rope and felt severe chest pain *for the first time*, this was related to the coronary thrombosis and myocardial infarction in D'Ornellas diagnosed following the collapse on January 17th and to the later death of D'Ornellas from arteriosclerotic heart disease (T74-78).

Claimant did not identify "Angie", the alleged foreman to whom, according to the claim of D'Ornellas placed in evidence (Ex. 1), he reported his injury "at once" on January 14, 1955. Claimant produced no one at the hearing who witnessed the alleged injury.

c) Evidence presented by Deputy Commissioner.

The Deputy Commissioner placed in evidence the hospital records of both Kings County Hospital where D'Ornellas was case No. 17504 and Beekman Downtown Hospital, as a single exhibit (Dep. Com'rs. Ex.).

These records indicated D'Ornellas was a diabetic and cardiac (Dep. Comr's. Ex. p. 1); that in 1951 it was discovered on X-ray that D'Ornellas had an arteriosclerotic heart (Dep. Comr's. Ex. p. 14); that he had visited the diabetic clinic of Kings County Hospital for nearly four years before his collapse (Dep. Comr's. Ex. p. 12); *that he complained of pain in his right chest and arm at Kings County Hospital on Monday, January 10, 1955* (Dep. Comr's. Ex. p. 11).

Portions of the records of Beekman Downtown Hospital where D'Ornellas was admitted immediately after his collapse on Monday, January 17th some three days after the alleged line-pulling incident, are significant since they confirm the fact that the chest pains of D'Ornellas antedated January 14th and that he had easy porter work on the company pier.

The admission sheet of January 17, 1955 states:

> "This 60 year old white male comes in to the Hospital complaining of *chest pain radiated to his right arm of one week duration.* Pt. states he took nitroglycerin which did not stop the pain * * * " (Dep. Comr's. Ex. p. 2).

A note of Dr. Shalsa in the continuation sheet reads:

> "Patient is a known diabetic complaining about chest pain—and numbness in the lateral chest side and right arm. *Chest pain for about one week* * * * " (Dep. Comr's. Ex. p. 4).

The continuation sheet contains a further entry:

> "2/4/55 Patient does not want convalescent care unless there is a medical necessity. He lives with his wife—a nurse—employed at Kings County Hospital—and he feels she can provide necessary care. *There is the problem of three flights of stairs* but he has indicated that once he gets home he can manage. *Although listed as a longshoreman his work he describes as easy porter work on the company pier an assignment following an injury on the job several years ago.*
>
> R. S. WINSLOW,
> Soc. Ser."

(Dep. Comr's. Ex. pp. 4-5).

d) *Evidence presented by petitioners.*

Although claimant did not identify "Angie", Andrew Bonowski, hiring agent or foreman of petitioner McGrath Corporation on Piers 9, 10 and 11, testified that *no one* told him D'Ornellas had an accident on the job (T59), that if D'Ornellas was down near a lighter he would have known it (T61).

The extra labor foreman of petitioner McGrath Corporation on Pier 9 would have to pass on an assignment to pull ropes on a lighter (T27). William Fixor extra labor foreman on Pier 9 testified that he had no knowledge of

the incident D'Ornellas claimed (T44), that if D'Ornellas had been pulling a barge as claimed "most possibly" he would have seen him, that D'Ornellas did not complain to him of pulling a barge and getting a chest pain (T45).

Richard McGrath, pier superintendent for Pier 9 and George Lucus, pier superintendent for Piers 9, 10 and 11, testified in effect that they would have known it if D'Ornellas had been on a lighter pulling a line (T40, T43; T68, T70, T72-73).

The testimony of all the above supervisory officials was that D'Ornellas was a sweeper in the office area at the head of Pier 9 (T26, T44, T55, T65), and that the orders on Pier 9 were that D'Ornellas was to have light work only (T28, T45, T61, T68-69). D'Ornellas in an earlier period had worked as a longshoreman but had been reassigned to light work as a sweeper because he was injury-prone (T27-28; T65-66).

Petitioners' medical expert, Dr. Texon, testified that exertion played no significant role in the development of a thrombosis or an occlusion (T92).

3. The Deputy Commissioner's Findings, Order and Award

The Deputy Commissioner found that the duties of John D'Ornellas as an employee of petitioner McGrath Corporation "were generally of a light nature as a sweeper and cleaner". Against the contentions of petitioners however, he found that D'Ornellas was injured on or about 3 P. M. when "while standing on a lighter at Pier 9, pulling the lighter by a line unassisted, he suffered unusual strain accompanied by severe pain in the upper front chest resulting in a coronary thrombosis" which precipitated myocardial infarction from which his death followed. Upon his findings he made his order and award of a fee to claimant's attorney and continuing bi-weekly payments to claimant Rose D'Ornellas. The order was made March 6, 1957. The

complaint seeking review of said order was filed in the United States District Court for the Southern District of New York on April 4, 1957.

Argument

New York compensation law has application to workmen's injuries arising out of and in the course of employment so long as they occur upon a pier as opposed to navigable waters. *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263 (1922); *Smith & Son* v. *Taylor*, 276 U. S. 179 (1928). By the very language of the Longshoremen's Act, there is no jurisdiction to award federal compensation unless the injury occurs upon navigable waters *and* no state compensation act applies, 33 U. S. Code Section 903(a). Under no circumstances, therefore, is there any right to compensation under the Longshoremen's Act if the injury arising out of and in the course of employment occurs on a pier. *Johnston* v. *Marshall*, 128 F. 2d 13 (9th Cir. 1942), cert. denied 317 U. S. 629 (1942), rehearing denied 318 U. S. 799 (1943); cf. *Jeffers* v. *Foundation Co.*, 85 F. 2d 24 (2nd Cir. 1936).

The only person whom claimant can identify as an observer of the situs of the alleged line pulling incident is the deceased employee John D'Ornellas. The Opinion of the Court of Appeals suggests that there is corroboration of the hearsay declarations of this deceased employee as to the situs of his alleged injury on or about Friday January 14th, by reason of the *double* hearsay attributed to Edward Kinnally (or Canelli) to the effect that he did not see such an incident, but heard others whose names he cannot remember, talk of it. This supposed corroboration is of course the flimsiest sort of evidence, mere rumor or hearsay upon hearsay.

The evidence to support the claim that D'Ornellas was involved in a line-pulling incident involving injury at work

anywhere, is just as weak as that which would place such an incident upon navigable waters so as to give it a jurisdictional situs. Here again the only person whom claimant can identify as an observer of a line-pulling incident is the deceased employee; and in reality the *double* hearsay of Kinnally (or Canelli) is the only semblance of corroboration.

To be sure, D'Ornellas claimed more than once that he had been pulling a line fastened to a lighter, on a Thursday or Friday. The fact that this injury-prone workman (who no doubt was familiar with the ins and outs of compensation proceedings) told somewhat differing accounts about pulling a line * does not make his claim any less self-serving and incompetent hearsay, or any more credible. In reality it is corroboration neither of the incident nor its situs.

While the Opinion of the Court of Appeals also tries to find corroboration "in a lesser degree" in the fact that D'Ornellas came home sick on a Thursday or a Friday, this bit of evidence has no significance at all since D'Ornellas had been suffering pains in his right chest and arm *for some three days before the Thursday in question* and claimant Rose D'Ornellas admitted that her husband *was sick every night when he came home.* Furthermore, upon cross-examination, claimant's medical expert conceded that a coronary thrombosis can be a spontaneous occurrence without extraordinary effort (T84-85) so that chest pains are not reliable indicia of exertion. Then again, even if chest pains could be attributed to an exertion, there is no reason to assume the exertion occurred at work—perhaps climbing up the three flights of stairs in his own apartment building would be sufficient exertion—or to assume the exertion took place upon navigable waters instead of land.

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* D'Ornellas allegedly told his wife *he started waving his hands* when he felt the chest pain after pulling (T6) but he told Dr. Texon that when the pain came he stopped work and rested (T22).

According to his claim (Ex. 1), D'Ornellas was pulling all by himself but he told Dr. Texon he was helping to move a barge (T22).

To Beekman-Downtown Hospital authorities, however he described his work as "easy porter work" (Dep. Com's Ex. pp. 4-5).

Finally, in spite of the contrary view of the Court of Appeals, the testimony of George Lucas to the effect that it was not unusual to have a stevedore on a lighter pulling a barge was not corroboration for the proposition that the deceased D'Ornellas performed such an assignment. Lucas testified that it was *very unusual* (T72), and *not probable* (T73) that the deceased was so employed. Claimant Rose D'Ornellas conceded that D'Ornellas was regularly employed as a sweeper not as a longshoreman during this period (T12-13). The Beekman-Downtown Hospital records note that although listed as a longshoreman, D'Ornellas described his work as "easy porter work on the company pier an assignment following an injury on the job several years ago."

Certainly whatever evidence beyond incompetent hearsay which the Opinion of the Court of Appeals would claim to be corroborative * could not by any stretch of reasoning be regarded as more than a scintilla and thus by the legislative intent manifest in the history of the Administrative Procedures Act, it should be disregarded.**

At the outset of the administrative proceedings there was a presumption that the claim was properly brought under the Longshoremen's Act.*** This presumption had disappeared however after the Deputy Commissioner had put in evidence the hospital records, and petitioners presented their testimony to the effect that D'Ornellas although a longshoreman in an earlier period, had been reassigned to light work as a sweeper because he was injury

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* The District Court in its opinion attempted to find corroboration in the fact that Dr. Texon repeated to petitioner John W. McGrath Corporation what John D'Ornellas had said, without adding a skeptical comment. Yet this medical expert was examining into the physicial condition of D'Ornellas and not his veracity. Since Dr. Texon was not trying the facts his unexpressed hearsay opinion on the latter subject was irrelevant as well as incompetent.

** See Appendix C, pages 34-35, 37-38.

*** 33 U. S. Code Section 920, Appendix B, page 28.

prone, that the orders were that he was to have light work only, that he was a sweeper in the office area at the head of Pier 9, and that they had no knowledge of his pulling a line as claimed.* The only office of this presumption is to control when there is an entire lack of competent evidence, *Del Vecchio* v. *Bowers*, 296 U. S. 280, 286 (1935).

By reason of the presumption, petitioners had the burden of coming forward with some evidence to *negative* the contentions presented by claimant but could not reasonably be expected to produce positive and direct testimonial evidence denying claimant's contentions. Of necessity the evidence presented by petitioners was circumstantial, but it was sufficient to meet the burden. The Deputy Commissioner found that the duties of D'Ornellas "were *generally* of a light nature as a sweeper and cleaner" (11a). Thus without considering the incompetent and uncorroborated hearsay of D'Ornellas and Kinnally (or Canelli), even the Deputy Commissioner would have ascribed more than 50% probability to the proposition that D'Ornellas was *not* pulling a line, as claimed.

The ultimate questions of law in this case therefore concern themselves with whether administrative findings can properly be made of "navigable waters" jurisdiction and of "an accidental injury arising out of and in the course of employment" under the Longshoremen's Act and the Administrative Procedures Act, when these findings are supportedly solely by incompetent hearsay evidence and there is circumstantial evidence to the contrary.

In proceedings under the Longshoremen's Act before December 11, 1946, the effective date of the Administrative Procedures Act **, a Deputy Commissioner was able to apply a mechanical test in determining where the statements of a deceased employee concerning his injury could be received

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* See pages 9-10, *supra*.

** See Section 12 of the Administrative Procedures Act, 5 U. S. Code Section 1011 set out in Appendix B, page 31.

in evidence to establish the injury. The Longshoremen's Act provided:*

> "* * * Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury. * * *"

Whatever may have constituted sufficient mechanical corroboration in the administrative proceedings before December 11, 1946, the rule now is that the sum total of evidence in support of an order must be "reliable, probative and substantial evidence" ** and that administrative findings shall be set aside if "unsupported by substantial evidence" upon a review of the whole record,*** *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474 (1951). The Administrative Procedures Act on its face applies to proceedings under the Longshoremen's Act and this Court has so ruled, *O'Leary* v. *Brown-Pacific Maxon, Inc.*, 340 U. S. 504 (1951), so that the older cases dealing with the question of what is sufficient corroboration, such as *Associated General Contractors* v. *Cardillo*, 106 F. 2d 327 (D. C. Cir. 1939), should no longer have value as precedents.

A detailed legislative history of the Senate bill for an Administrative Procedures Act **** which finally became law in 1946, is presented in Appendix C to this petition. This legislative history makes it clear that Congress, in setting up the standard of "substantial evidence" for administrative orders and findings intended that these should be supported by more than incompetent hearsay, and by

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* 33 U. S. Code Section 923(a), Appendix B, page 29.

** 5 U. S. Code Section 1006(e), Appendix B, page 30.

*** 5 U. S. Code Section 1009(e), Appendix B, pages 30-31.

**** The Senate Bill (S. 7) was introduced at the 79th Congress, 1st Session.

more than a scintilla of competent evidence.* The accepted standards of proof as distinguished from mere admissibility of evidence were intended by the words "substantial evidence", to govern in administrative proceedings in the same way as they do in Courts of law and equity.** In reviewing administrative orders and findings under the Administrative Procedures Act, courts were asked to exercise their independent judgment upon a review of the record as a whole, and not approve the administrative order or finding merely because there was some evidence to support it,*** *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 487-488 (1951). Finally the rule of *Consolidated Edison of New York* v. *National Labor Relations Board*, 305 U. S. 197, 229-230 (1936) to the effect that mere uncorroborated hearsay or rumor does not constitute substantial evidence to support administrative findings, received express approval on the floor of the House during its consideration of the Senate Bill.****

The full impact of the evidentiary standards of the Administrative Procedures Act upon the Longshoremen's Act has never been definitively stated by this Court and there is confusion among the Circuits. In *Colonna's Shipyards Inc.* v. *O'Hearne*, 200 F. 2d 220 (4th Cir. 1952), the Fourth Circuit obviously made the "independent judgment" called for in the House Report upon Section 10(e) of the bill for an Administrative Procedures Act, and approved by this Court in the *Universal Camera* case. Other circuits however have deemed they have no right of independent judgment of Longshoremen's Act orders and findings because of language used by this Court in *O'Leary* v. *Brown-Pacific Maxon Inc., supra*, e.g., *Hastorf-Nettles Inc.* v. *Pillsbury*, 203 F. 2d 641, 643 (9th Cir. 1953). Indeed the Second Circuit in this case has conceded:

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* See Appendix C, pages 34-35, 37-38.
** See Appendix C, pages 32, 36.
*** See Appendix C, pages 33, 36-37.
**** See Appendix C, pages 35, 37.

"Perhaps this is not the result we would have reached had the case come before us de novo * * *"

Logically however, the evidentiary standards of the Administrative Procedures Act should apply in Longshoremen's Act proceedings in the same way that they apply to all other administrative proceedings.

The usual reason for affirming the findings of the trier of fact upon a judicial review is that the trier of fact can best resolve the questions as to credibility because he can observe the witnesses who are giving testimony. Here however the Deputy Commissioner actually made his findings upon the statements of persons who were not before him. Is there any reason to inhibit independent judgment in such circumstances?

The specific rule *applied* by the Court of Appeals for the Second Circuit in the instant case is in direct conflict with the rule of the Ninth Circuit to the effect that an administrative order and the administrative findings thereunder must be supported by something more than uncorroborated hearsay. *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 691 (9th Cir. 1949); *National Labor Relations Board* v. *Amalgamated Meat Cutters*, 202 F. 2d 671, 673 (9th Cir. 1953).

The common law rules restricting the admission of hearsay evidence are grounded on the fact that the admission of hearsay involves a denial of cross-examination. It would appear that this Court was long of the opinion that there was a failure of due process under the Fifth Amendment not only when cross examination was denied in administrative proceedings but also when administrative findings were based solely upon incompetent hearsay. *Interstate Commerce Commission* v. *Louisville & N.R.R. Co.*, 227 U. S. 88, 91-93 (1913); *Consolidated Edison of New York* v. *National Labor Relations Board*, *supra*. Of late this Court has shown zealous concern lest in criminal cases the right of cross examination be unreasonably abridged, *Jencks* v. *United States*, 353 U. S. 657 (1957). It should appear that

questions as whether administrative orders and findings may validly be made under the Administrative Procedures Act upon uncorroborated incompetent hearsay evidence should also be a matter of continuing national concern.

To the knowledge of your petitioners, this Court has not expressed itself on the general subject matter of the propriety of administrative orders and findings supported only by uncorroborated hearsay or rumor, since its decision in the *Consolidated Edison* case twenty-one years ago. With the passage of the Administrative Procedures Act during that interval, it should be eminently appropriate for this Court, in view of the differing treatment of administrative findings supported only by naked hearsay in two Circuits, to restate its rule on this subject matter in a case involving the Longshoremen's Act.

CONCLUSION

For the foregoing reasons, petitioners should be granted a writ of certiorari in this case.

Respectfully submitted,

JOHN M. CUNNEEN,
Attorney for Petitioners.

Dated: May 25, 1959.

APPENDIX A

Opinion of Court of Appeals, Second Circuit, on Affirmance

WATERMAN, *Circuit Judge*:

Plaintiffs, an employer and an insurance carrier, sought to have the district court review and set aside a compensation order and an award of death benefits made pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. Sec. 901 et seq., to the widow of a deceased employee. The Court below granted the defendant Deputy Commissioner's motion for a summary judgment. Plaintiffs bring this appeal, contending, as they did below, that the Deputy Commissioner improperly found an injury arising out of and in the course of employment, 33 U. S. C. Sec. 902(2),[1] occurring upon the navigable waters of the United States, 33 U. S. C. Sec. 903(a).[2]

* * *

John D'Ornellas, the deceased, had been employed for a considerable period of time by McGrath Corporation, a stevedoring concern. On the date of the alleged injury he was working as a sweeper, having been given that job some three or four months previously when it became apparent that his diabetic condition prevented him from working safely as a stevedore. Rose D'Ornellas, widow of the deceased and claimant herein, testified that on either January 13 or 14, 1955 her husband had come home from work looking sick and complaining that he had been ordered to work on a lighter pulling the lighter with a line. He told

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[1] Sec. 902 Definitions. When used in this chapter— * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, * * *.

[2] Sec. 903. Coverage.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States * * *.

her that following this pulling he suffered great pain in his chest and arm and had to stop work and rest. After staying in bed over the weekend he reported for work on Monday, January 17, and at about 8:45 A. M. on that day he collapsed. He was immediately taken to the hospital where he was found to have suffered a myocardial infarction. He was discharged from the hospital on February 12, 1955, and three weeks later, on March 5, 1955, he died.

In an interview with plaintiff's physician, Dr. Texon, on January 22, 1955, the deceased stated that he first felt the severe pain when he "was pulling a rope to help move a barge around the pier." Substantially the same statement was made by deceased in his claim for compensation dated February 15, 1955. His widow introduced at the hearing a written statement purportedly signed by one Kinnally, a dock boss for McGrath Corporation at the time of the accident, but who had died prior to the hearing, stating that it had been reported to Kinnally by workmen who were there at the time that D'Ornellas "had had a heart attack on a lighter at Pier 9 while he was hauling on a line." In opposition, plaintiffs presented uncontradicted testimony by four of the McGrath Corporation's supervisory employees to the effect that D'Ornellas had been told that he was to confine himself to sweeping and running errands, that he was not to go out on the dock when work was being done there, and that similar orders had been conveyed to the men in charge of the work on the dock. However, George Lucas, McGrath's terminal superintendent, one of these four witnesses, admitted on cross-examination that there was nothing unusual about having a stevedore aboard a lighter pulling a barge.

Claimant's medical expert testified that if the alleged incident occurred it was his opinion that the incident was causally related to the ensuing disability and death. The Deputy Commissioner chose to believe this witness, and since the doctor's testimony was not "so inherently im-

probable that it was unworthy of belief as a matter of law" we do not disturb the Commissioner's finding that there was this causal relation. Gooding v. Willard, 209 F. 2d 913, 916 (2 Cir. 1954). But we must still be satisfied that there was sufficient evidence for the Deputy Commissioner properly to find out the alleged incident truly happened, arising out of and in the course of employment, 33 U. S. C. Sec. 902(2), and occurring not on the dock but upon the navigable waters of the United States, 33 U. S. C. Sec. 903(a); Johnston v. Marshall, 128 F. 2d 13 (9 Cir. 1942), *cert. denied*, 317 U. S. 629 (1942), *rehearing denied*; 318 U. S. 799 (1943); cf. Jeffers v. Foundation Co., 85 F. 2d 24 (2 Cir. 1936).

Sections 7 and 10 of the Administrative Procedure Act, 5 U. S. C. Secs. 1006, 1009, define our scope of review in cases such as this, Gooding v. Willard, 209 F. 2d 913 (2 Cir. 1954); and see O'Leary v. Brown-Pacific Maxon, Inc., 340 U. S. 504 (1951). They provide that no administrative order should be issued unless it is supported by "substantial evidence." Evidence is "substantial" if it is the kind of evidence a reasonable mind might accept as adequate to support a conclusion. Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 477 (1951); Ellers v. Railroad Retirement Board, 132 F. 2d 636 (2 Cir. 1943); National Labor Relations Board v. Remington Rand, 94 F. 2d 862 (2 Cir. 1938), *cert. denied*, 304 U. S. 576, 585 (1938), *rehearing denied*, 304 U. S. 590 (1938).

We cannot, as defendants seem to urge, consider the presumption in the Longshoremen's Act,[3] as having here

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[3] Sec. 920. Presumptions.

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * *

the quality of independent affirmative evidence. We believe that plaintiffs offered sufficient proof to rebut that presumption and consequently it must fall out of the case. It cannot be weighed with defendants' evidence against plaintiffs' since "(i)t's only office is to control the result where there is an entire lack of competent evidence." Del Vecchio v. Bowers, 296 U. S. 280, 286 (1935).

After examining the record as a whole we must affirm the decision below. Perhaps this is not the result we would have reached had the case come before us *de novo*, but that is unimportant. Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 488 (1951). Deceased told his wife that he was injured while standing on a lighter pulling a line under orders from a superior, and his statements to others were consistent therewith. The statement by Kinnally corroborates deceased's declarations. Additional corroboration, though perhaps to a lesser degree, can be found in the testimony of Rose D'Ornellas that deceased came home sick on the day of the alleged incident, Associated General Contractors v. Cardillo, 106 F. 2d 327 (D. C. Cir. 1939), and in the testimony of George Lucas that it was not unusual to have a stevedore aboard a lighter pulling a barge. On all the evidence we cannot say that the Deputy Commissioner committed error. Associated General Contractors v. Cardillo, supra; cf. Ellers v. Railroad Retirement Board, 132 F. 2d 636 (2 Cir. 1943); National Labor Relations Board v. Service Wood Heel Co., 124 F. 2d 470 (1 Cir. 1942).

Affirmed.

Opinion of United States District Court for the Southern District of New York

RYAN, *J.*

The Government has moved for summary judgment (Rule 56) in this suit filed by John W. McGrath Corporation and the Fidelity & Casualty Company of New York to review and set aside a compensation order and award made under the provisions of the Federal Longshoremen's and Harbor Workers' Compensation Act (33 USCA 901 et seq.) to Rose D'Ornellas, widow of John D'Ornellas, a deceased employee of the McGrath Corporation.

The award was made upon the claim "that John D'Ornellas, the deceased, in the course of his employment as a sweeper and longshoreman for the John W. McGrath Company, on or about January 14, 1955 while engaged in work for that company, suffered a coronary occlusion with myocardial infarction, and that as a result of that accident he died on March 5, 1955."

It is not in dispute that D'Ornellas was in the employ of the McGrath corporation on January 14, 1955; that on Monday, January 17, 1955 at about 10 A. M. he was taken by ambulance from this employment at Pier 9, North River to the Beekman Downtown Hospital, that he remained there as a patient until February 12, 1955, that he was found to have suffered a coronary occlusion secondary to coronary thrombosis and that he died on March 5, 1955.

It also appears of record that D'Ornellas on February 15, 1955 filed an employee's claim for compensation stating that he had sustained an injury to his chest and heart during the course of his employment at 3 p. m. on January 14, 1955 which was caused by "pulling a lighter by line by himself, felt severe pain in chest."

The causal relation between the incident claimed and the ensuing disability and death was questioned by the employer and insurer. There is ample medical testimony to support the finding of a chain of causation between a strain

or strenuous exertion and an exacerbation of the coronary ailment to which the deceased unquestionably succumbed.

But the employer and insurer also disputed the happening of the alleged causative incident, and now urge that the evidence was insufficient to support a finding of its occurrence because the only evidence of the happening of the incident was claimed are the hearsay declarations of the deceased employee, which stand uncorroborated by other evidence.

Section 23 of the Longshoremen's Act (33 USCA 923(a)) provides for the receipt of proof beyond the limitations set by "common law or statutory rules of evidence or by technical or formal rules of procedure." Thus, hearsay evidence, so called, was admissible before the Commissioner at the hearing of the claim and the character of this proof affected only the weight to be given it. The Commission accepted the declarations of the deceased employe as truthful statements of what did in fact befall him and based the award on such a finding; herein, it is claimed lies error, for it is contended that these statements of the deceased are not corroborated by other evidence, as the statute requires (Sec. 23 of the Longshoremen's Act, Sec. 923(b)).

We have examined and considered the record as a whole. *O'Leary* v. *Brown-Pacific Maxon*, 340 U. S. 540 (1951). We hold following *Associated General Contractors* v. *Cardillo*, 106 F. 2d 327, 329 (C. A. D. C. 1939) that "Whatever tends to make a story substantially more credible or probable corroborates it." Although as tersely stated in *Matter of Altschuller* v. *Bressler* (1943), 289 N. Y. 463, 469, the problem is whether there is a sufficient "residuum of legal evidence," it is not "required that such residuum should, independently of the 'hearsay' evidence establish the accident."

Appendix A—Opinion of United States District Court for the Southern District of New York

The record reveals that Rose D'Ornellas, the widow of the deceased, testified that on either January 13 or 14, 1955 her husband came home from work looking tired and sick, that he complained to her that "he was sent to work on a lighter, and he had objection to that. He was a maintenance man" * * * "that he was pulling the lighter * * * some kind of lines he was pulling, and he felt a pain in his chest;" that she was a practical nurse working in a city hospital, that she gave him medication, that she did not go to work for the next two days (Saturday and Sunday) but stayed at home and nursed him until he returned to work on Monday, January 17, 1955 (the day on which he was taken from the job to the hospital).

There is also the testimony of Dr. Meyer Texon, an internist and cardiac specialist who at the request of the employer examined D'Ornellas at the Beekman Downtown Hospital on January 22, 1957. Dr. Texon testified that the deceased had told him that "on Thursday, January 13, 1955 about 2 p. m., I was pulling a rope to help move a barge around the pier. While pulling and working I felt a severe pain around my upper front chest. I stopped working and rested about 10 minutes until the pain subsided * * *."

We must remember that the deceased had made the same statement in his claim filed on February 15, 1955.

As corroboration of the truthfulness of these statements of the deceased, there is

1. The fact that his wife, a woman of several years practical nursing experience, observed his physical condition when the deceased came home from work on the day of the incident; that he was in fact ill and required nursing for the two following days.

2. The fact that Dr. Texon in his report to the employer dated January 28, 1955 made no specific adverse observation when he wrote:

"The first complaint with respect to the heart appears to have occurred on Thursday, January 13, 1955, while the patient was exerting considerable effort in the course of his work which required pulling a rope in order to move a barge around the pier."

The Doctor apparently found no cause or occasion to question the truthfulness of the deceased's statement as to the incident of January 14, 1957.

3. The fact that the dock boss for the McGrath Corporation—one Edward Kinnally who died before the hearings—had signed a statement that it had been reported to him by one of the workmen that the deceased had had a heart attack on a lighter on Pier 9 while he was hauling on a line at Pier 9 on January 14, 1955.

A reading of the entire record leaves the impression that the award is just and fair under the law. There is sufficient evidence of circumstances surrounding the several separate statements of the deceased to lend the required corroborative support to them; there is the other evidence to which we have referred which affords further corroboration. The circumstances under which the declarations were here made and the other evidence was ample to support an inference that the incident occurred when, where and as the deceased stated.

Motion granted; complaint dismissed; settle order.

SYLVESTER J. RYAN,
USDJ.

10/16/57

APPENDIX B

Constitution and Statutes Involved

(a) Constitution of the United States Amendment V:

"No person shall be held to answer for a capital, or other infamous crime * * *; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; * * * nor be deprived of life, liberty, or property, without due process of law; * * *."

(b) The Longshoremen's Act [44 Stat. 1424 (1927)] as codified in Title 33, United States Code:

"SECTION 902. Definitions

When used in this chapter—

* * *

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

"SECTION 903. Coverage.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State Law * * *."

"SECTION 919. Procedure in respect of claims.

* * *

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect to the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and

other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose."

"SECTION 920. Presumption

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

"SECTION 921. Review of compensation orders

(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District).

The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States * * *."

"SECTION 923. Procedure before the deputy commissioner

(a) In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury."

(c) The Administrative Procedures Act [60 Stat. 238 (1946)] as codified in Title 5, United States Code:

"SECTION 1001. Definitions.

As used in this chapter—

(a) 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia; * * *

* * * *

(b) 'Person' includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. 'Party' includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes."

"SECTION 1004. Adjudications.

In every case of adjudication required by statute to be determined after opportunity for an agency hearing, * * *

* * * *

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title."

"SECTION 1006. Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision.

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) • • •

(b) • • •

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

"SECTION 1009. Judicial review of agency action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

• • •

(e) So far as necessary to decision and were presented the reviewing court shall decide all relevant questions of

law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any part, and due account shall be taken of the rule of prejudicial error." * * *

"SECTION 1011. Impairment of rights; effect on other laws; separability; subsequent legislation; effective date.

Nothing in this chapter shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this chapter or the application thereof is held invalid, the remainder of this chapter or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly. This chapter shall take effect three months after its approval except that sections 1006 and 1007 of this title shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 1010 of this title shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement." * * *

APPENDIX C

Legislative History of Substantial Evidence Test in the Administrative Procedures Act

The bill for an Administrative Procedures Act (S. 7) was introduced in the Senate at the 79th Congress, First Session.

The second sentence of Section 7(c) of that bill as introduced on the floor of the Senate should be compared with 5 United States Code Section 1006(c). This Section 7(c) provided:

> "Any evidence, oral or documentary, may be received, but every agency shall as a matter of policy provide for the exclusion of immaterial and unduly repetitious evidence and no sanction shall be imposed or rule be issued except as supported by relevant, reliable and probative evidence."

This sentence was commented on in the Senate Report * in the following language:

> "The second and primary sentence of the subsection is framed on the theory that an administrative hearing is to be compared with an equity proceeding in the courts. The mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant and unduly repetitious evidence is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon evidence which is plainly of the requisite materiality and competence; that is 'relevant, reliable and probative evidence'. Thus while the exclusionary 'rules of evidence' do not apply except as the agency may as a matter of good practice simplify the hearing and record by excluding obviously improper or unnecessary evidence, the standards and principles of probity and reliability of evi-

* S. Rept. No. 752 (79th Cong., 1st Sess.).

> dence must be the same as those prevailing in courts of law or equity in non-administrative cases. There are no real rules of probity and reliability even in courts of law, but there are certain standards and principles—usually applied tacitly and resting mainly upon common sense—which people engaged in the conduct of responsible affairs instinctively understand and act upon. They may vary with the circumstances and kind of case, but they exist and must be rationally applied. These principles under this subsection are to govern in administrative proceedings." (S. Rept. No. 752, supra, p. 22.)

Section 10(e) of the Senate bill as introduced on the floor of the Senate should be compared with 5 United States Code Section 1009(e). This Section 10(e) provided by its second and third sentences that the reviewing court shall:

> "(B) hold unlawful and set aside agency action findings and conclusions found to be * * * (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by state * * *. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by the parties, and due account shall be taken of the rule of prejudicial error."

The Senate Report commented on the above language of Section 10 as follows:

> "* * * 'Substantial evidence' means evidence which on the whole record is clearly substantial, sufficient to support a finding or conclusion under 7(e) and material to the issues." (S. Rept. No. 752, supra, p. 28.)

Senator McCarran, Chairman of the Senate Committee of the Judiciary explained the meaning of the "substantial evidence" test proposed in that bill on the floor of the Senate in answering questions of his fellow Senators:

"Mr. Ferguson: Would the Senator then say that the judgment or decision of the agency must be based upon stronger proof than a scintilla of evidence?

"Mr. McCarran: Very much stronger.

"Mr. Ferguson: The old rule which applied in the courts, particularly on certiorari, was that if there was any evidence to sustain the verdict or judgment, it should be sustained. The courts have many times so held. The Senator would say, would he not, that something more than 'any evidence' is required to sustain such a decision.

"Mr. McCarran: The answer is in the affirmative. We say the evidence must be substantial probative evidence.

"Mr. Ferguson: So we are changing the rule which has been applied in the past that any evidence, or a scintilla of evidence, as it is sometimes defined, is sufficient to sustain a verdict or judgment.

"Mr. McCarran: We tried as best we could to establish a guide for administrative groups so that they would apply the rule in such a way that there would be a substantial probative evidence behind their findings, and so that they could say 'We are not afraid to have our findings reviewed by a court'.

"Mr. George: Mr. President, will the Senator yield?

"Mr. McCarran: I yield.

"Mr. George: The courts have many times held that if there is any evidence to sustain the finding of an administrative board under the statute, the courts have no power to intervene. If this bill should become a law would that rule, as heretofore construed by the courts, remain in effect?

"Mr. McCarran: The courts have given various constructions. The courts in reviewing an order, are governed by the provisions of section 10(e), which states the substantial-evidence rule. In other words, in some instances the courts have held that there must be substantial evidence. We are saying that there must be probative evidence of a substan-

tial nature, and that even though the commission or bureau may take hearsay evidence in its hearings, it must have some probative evidence to sustain its finding.

"Mr. George: The point I wish to raise is that some of the acts of Congress, particularly those enacted in recent years, have led the courts to hold—and they so hold—that if there be any evidence to sustain the finding of a board or agency, the court has no power to interfere with it.

"Mr. McCarran: I would put it in this way.

"Mr. George: Would the enactment of this bill require some substantial or probative evidence to support such a finding?

"Mr. McCarran: Yes." (92 Cong. Rec. 2157-2158).

This bill passed the Senate without modification of the language of Sections 7(c) and 10(e) hereinabove quoted (92 Cong. Rec. 2164-2167).

The House Judiciary Committee reported out * the Senate bill (S. 7) at the Second Session of the 79th Congress. It made no significant amendment to the quoted language but amended the language of the second sentence of Section 7(c) so that it provided:

> "Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence and no sanction shall be imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable probative and substantial evidence."

The language quoted immediately above is presently found in 5 United States Code Section 1006(c).

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* H. Rept. 1980 (79th Cong., 2nd Sess.).

Appendix C—Legislative History of Substantial Evidence Test in the Administrative Procedures Act

The comments of the House Judiciary Committee upon the second sentence of Section 7(c) of the bill as amended * are almost identical with those in the Senate Report. Its comments on the "substantial evidence" test of Section 10(e) of the bill were far more illuminating than those in the Senate Report. The House Report declared:

> "'Substantial evidence' means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7(c), and material to the issues. It is exceedingly important. Difficulty has come about by the practice of agencies and courts to rely upon something less—suspicion, surmise, implications or plainly incredible evidence. Although the agency must do so in the first instance, under this bill it will be the duty of the courts to determine in the final analysis and in the exercise of its independent judgment whether on the whole of the proofs brought to their attention the evidence in a given instance is sufficiently substantial to support a finding, conclusion or other agency action or inaction. In reviewing a case under this fifth category the court must base its judgment upon its own review of the entire record or so much thereof as may be cited by any party." (H. Rept. No. 1980 supra p. 45.)

In introducing the bill on the floor of the House, Representative Walter, Chairman of Subcommittee on Administrative Law of the House Judiciary Committee explained the effect of Section 7(c) of the bill as follows:

> "The requirement that agencies may act only upon relevant probative and substantial evidence means that the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity. The same provision contains two other limitations—first, that the agency

* See H. Rept. 1980, *supra*, page 36.

must examine and consider the whole of the evidence relevant to any issue and secondly, that it must decide in accordance with the evidence. Under these provisions the function of an administrative agency is clearly not to decide arbitrarily, or to act contrary to the evidence or upon surmise or suspicion or untenable inference. Mere uncorroborated hearsay or rumor does not constitute substantial evidence—See *Edison Co.* v. *Labor Board* (305 U. S. 197, 230). Under this section agencies are not authorized to decide in accordance with preconceived ideas or merely to sustain or vindicate prior administrative action, but they must enter upon a bona fide consideration of the record with a view to reaching a just decision upon the wole of it." (92 Cong. Rec. 5653.)

He described Section 10(e) of the bill in similar vein:

"The term 'substantial evidence' as used in this bill means evidence which upon the whole record as reviewed by the court and in the exercise of the independent judgment of the reviewing court is material to the issues, clearly substantial, and plainly sufficient to support a finding or conclusion affirmative or negative in form under the requirements of section 7(c) heretofore discussed. Under this section the function of the court is not merely to search the record to see if it is barren of any vestige of reliable and probative evidence, or supports the agency action by a scintilla or mere hearsay, rumor, suspicion, speculation and inference—cf. *Edison Co.* v. *Labor Board* (305 U. S. 197, 229-230). Under this bill it will not be sufficient for the court to find, as the late Chief Justice Stone pointed out within the year, merely that there is some 'tenuous support of evidence'—*Bridges* v. *Wixon* (326 U. S. at 178). Nor may the bill be construed as permitting courts to accept the judgments of agencies upon unbelievable or incredible evidence." (92 Cong. Rec. 5654, 5655.)

While the bill was being considered on the floor of the House, various other members of the House Judiciary Committee made comments on the bill. Representative Gwynne stated that the bill adopted the rule that administrative

findings must be supported by substantial evidence as opposed to a scintilla of evidence (92 Cong. Rec. 5656) and Representative Springer and Robison said the same thing in somewhat different words (92 Cong. Rec. 5657, 5659).

One member of the House who was not a member of the House Judiciary Committee, Representative Russell of Texas, expressed his concern that the language "Except as otherwise expressly provided by statute" (which introduced the first sentence of Section 7(c) of the bill) would somehow be applied to modify second sentence thereof so as to preserve dictatorial powers of an agency on the basis of the slightest evidence (92 Cong. Rec. 5660). The House Record continues:

> "Mr. Russell: When an agency has such an authorization, which under the authorization is the law, then this act is exempting that agency from a judicial review or a passing upon that evidence, regardless of the kind of evidence it may be.
>
> "Mr. Walter: Mr. Chairman, will the gentlemen yield?
>
> "Mr. Russell: I am glad to yield to the gentlemen.
>
> "Mr. Walter: The gentlemen is not seriously contending that an agency decision based upon a mere scintila of evidence would hold up?
>
> "Mr. Russell: If the law has made it such, it will hold up under the very phrase I have just read. That is what I am afraid of.
>
> "Mr. Walter: Well, the measure now under consideration is designed to prevent that sort of thing, and will prevent it" (92 Cong. Rec. 5661).

Thereafter the committee amendment to the Senate bill for an Administrative Procedures Act (S. 7) was read (92 Cong. Rec. 5664-5666). Thereafter without any further amendment worthy of note, the bill passed the House (92 Cong. Rec. 5668), and the Senate (92 Cong. Rec. 5791), and became law.*

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* 60 Stat. 238 (1946).

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JUN 23 1958

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No. 950

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN W. McGRATH CORPORATION, ET AL., PETITIONERS

v.

THOMAS F. HUGHES, DEPUTY COMMISSIONER, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE DEPUTY COMMISSIONER IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Pet. 23-26) has not yet been reported. The opinion of the Court of Appeals for the Second Circuit (Pet. 19-22) is reported at 264 F. 2d 314.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1959. The petition for a writ of certiorari was filed on May 26, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether both courts below correctly decided that the repeated declarations of the deceased longshoreman that he was injured when pulling a vessel by line while aboard a lighter were corroborated by substantial evidence.

STATEMENT

This action to review a compensation award was filed pursuant to Section 21 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 921), and was instituted by petitioners against both John A. Willard, Deputy Commissioner for the United States Department of Labor, Bureau of Employees' Compensation, and the successful claimant before Commissioner Willard, Rose D'Ornellas (Pet. App. 3a-9a).[1] Petitioners subsequently substituted Willard's successor in office, Thomas F. Hughes, as appellee (Pet. App. T112). The pertinent facts are as follows:

In January 1955, the deceased, John D'Ornellas, was employed by petitioner John W. McGrath Corporation as a maintenance man to work on the dock (Pet. App. T6, Pet. 23). On January 14, 1955, D'Ornellas returned from work seriously ill and complained of a severe pain in his chest (Pet. App. T5-T7). His illness was of sufficient severity to cause his wife, who was employed as a practical nurse at a city hospital, to stay home from work the next two days (Saturday and Sunday) in order to nurse her husband and give him medication (Pet. App. T6, Pet. 25). D'Ornellas was ill continuously from the time that he arrived home (T6-T7). He told his wife that during his work day he had

[1] Pet. App. refers to petitioners' appendix in the court below.

been ordered by one of his supervisors to go aboard a lighter and pull on a rope in order to move a barge (Pet. App. T5-T7, Pet. 25). The deceased further stated to his wife that, while pulling on this line, he became ill, and signalled for help, whereupon one of his supervisors "took him off of the lighter" (Pet. App. T6).

D'Ornellas returned to work Monday, January 17. At about 8:45 a.m. he collapsed and was taken by ambulance to a nearby hospital where he was found to have suffered a myocardial infarction precipitated by a coronary thrombosis (Pet. App. T8, Pet. 6, 20, 23). He remained as a patient in the hospital until February 12, 1955 (Pet. 23). Thereafter, he stayed home as a convalescent until his death on March 5, 1955 (Pet. 6, 23).

On January 22, 1955, while the deceased was still hospitalized, he was examined by Dr. Texon at the request of his employer. Dr. Texon testified that the deceased told him that he first felt the chest pain when he "was pulling a rope to help move a barge around the pier." (Pet. 20, Pet. App. T22).

On February 15, 1955, the deceased filed an employee's claim for compensation in which he stated that during the course of his employment, at 3:00 p.m. on January 14, 1955, he sustained an injury to his chest and heart which was caused by "pulling a lighter by line" (Pet. 23).

After his death, the deceased's widow, Rose D'Ornellas, filed a claim for compensation under the Federal Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*) in which she alleged that her husband had died as a result of an injury received in the course of his employment with the Mc-

Grath Company on or about January 14, 1955 (Pet. 23). The employer and the insurance carrier contested her claim.[2] A full hearing was held before Deputy Commissioner John A. Willard at which, in addition to the above facts, the following testimony and documentary evidence were adduced:

(i) Mr. Lucas, terminal superintendent for the John W. McGrath Corporation, was called as a witness for the employer and the insurance carrier (Pet. App. T63). He testified that it was commonplace for workers to go aboard a lighter and pull a barge, and that while it would have been unusual for the deceased to have done so, it was nevertheless possible that he did (Pet. App. T72). Two other employees of the petitioner also testified that on some occasions the men would stand on a lighter and pull a barge (Pet. App. T58, T60, and T31-T32).

(ii) The claimant introduced a signed statement by one Edward Kinnally, a dock boss for the McGrath Corporation who died before the hearing, that it had been reported to him by several workmen who were there at the time that on January 14, 1955, D'Ornellas "had had a heart attack on a lighter at Pier 9 while he was hauling on a line" (Pet. 20, 26).

(iii) Dr. Seymour Cutler testified that, assuming that the alleged incident occurred (*i.e.*, the pulling of the barge), it was his opinion that the incident was causally related to the myocardial infarction from which D'Ornellas died (Pet. App. T77, Pet. 20).

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[2] Their grounds for contesting were that: (1) the injury did not occur on navigable waters and consequently the Act was inapplicable; (2) there was no accident within the meaning of the law; and (3) there was no causal relation between the alleged injury and the death of D'Ornellas (Pet. App. T3).

In his order of March 6, 1957 (Pet. App. 5a), the Deputy Commissioner granted the claimant an award predicated upon the following findings of fact (Pet. App. 10a-12a):

1. The deceased sustained a personal injury when, while standing on a lighter and pulling a vessel by a line, he suffered a great strain which resulted in a coronary thrombosis.

2. The injury arose out of and in the course of his employment.

3. The injury precipitated the myocardial infarction from which D'Ornellas died.

Petitioners then brought this action to review the Commissioner's award, alleging that his findings were not supported by substantial evidence. The district court granted the Government's motion for summary judgment and accordingly entered judgment in its favor (Pet. App. 21a-27a, Pet. 23-26). The Second Circuit affirmed (Pet. 19-22). Both courts explicitly found that the Deputy Commissioner's findings were supported by substantial evidence.

ARGUMENT

The gravamen of the petitioners' complaint was that the deceased did not, in fact, work aboard a lighter in January 1955, and that the finding of the Deputy Commissioner to the contrary was erroneous and unsupported by substantial evidence. If the Commissioner's finding on this question is correct, then it follows that the deceased received his injury while upon navigable waters [3] and while in the course of his employment, and

[3] See 33 U.S.C. 903(a) and *Johnston* v. *Marshall*, 128 F. 2d 13 (C.A. 9), certiorari denied, 317 U.S. 629.

the propriety of the award would then be beyond dispute. Since this case turns solely upon a factual decision regarding the quantity of evidence supporting the findings of an administrative agency, further review here is not warranted.

The findings of the Deputy Commissioner "are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole." *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 508. Also, Section 23(a) of the Longshoremen's and Harbor Workers' Compensation Act provides that the technical rules of evidence do not apply to procedures before the Deputy Commissioner and that (33 U.S.C. 923(a)):

> Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted *shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.* [Emphasis added.]

Since D'Ornellas told both his wife and Dr. Texon that he was injured while working on a lighter, and made a similar statement in his claim for compensation on February 15, 1955, the sole issue on which petitioners seek review by this Court is whether the two courts below were correct in deciding that there was corroboration in the record for these declarations of the deceased (Pet. App. T6-T7, T22, Pet. 23).

The claimant is not required to produce eye witnesses to her husband's injury in order to corroborate his declarations, but, to the contrary, "[w]hatever tends to make a story substantially more credible or probable corroborates it." *Associated General Con-*

trainers v. *Cardillo*, 106 F. 2d 327, 329 (C.A.D.C.).[4] The following evidence, contained in the record, is ample to meet this requirement:

(i) The deceased's wife testified that, on the day on which the deceased stated that he received his injury, he returned from work "looking terrible" and was continuously ill for three days (Pet. App. T6-T7). A woman of several years' practical nursing experience, she observed his physical condition that day and determined that his illness was of such severity that it required her care and nursing for the next two days, even though that necessitated her staying home from work (Pet. App. T6).

(ii) When the deceased attempted to return to his normal activities on the following Monday, he collapsed with a heart attack and had to be taken to the hospital in an ambulance (Pet. 20, 23).

(iii) Edward Kinnally, a former dock supervisor for the McGrath Corporation who died before the hearing,

---

[4] In *Cardillo*, the Court of Appeals stressed the liberality that must attend treatment of claimants under the Act. The court stated (106 F. 2d at 329):

> We should be construing the Act very narrowly if we held, in effect, that awards must be supported by eye-witness testimony. As appellees' counsel point out in their brief: apart from declarations of the deceased, fatal "injuries sustained by employees while working alone or not under observation * * * cannot ordinarily be proved by any means other than the introduction of (1) testimony, such as was adduced in the present case * * * that cuts, bruises, lacerations, or other objective symptoms of injury were observed * * * shortly after the injury was alleged to have been sustained, and (2) medical evidence that the alleged injury could have occurred in the manner described by the decedent and could have caused the condition of the decedent disclosed by medical examination or autopsy." Awards have been sustained in many cases of unwitnessed fatal injuries.

signed a statement that several workers who had been present at the time told him that D'Ornellas had had a heart attack on January 14, 1955, while hauling on a line aboard a lighter (Pet. 20, 26, and Claimant's Exhibit 2).

(iv) George Lucas, McGrath's terminal supervisor, testified that it was not unusual to have a stevedore aboard a lighter pulling a barge and that it was possible that the deceased had done so at the time in question (Pet. App. T72, Pet. 22).

Petitioner attempts to avoid the efficacy of this evidence by arguing that part of it was hearsay and, therefore, incompetent,[5] and the remainder, while competent, was insufficient (Pet. 13). Of the four enumerated evidentiary items, only one (*viz.*, Kinnally's written statement) would not have been admissible under the technical rules of evidence. The remaining three, however, provide more than ample support for the deceased's statements. In *Associated General Contractors* v. *Cardillo*, 106 F. 2d 327 (C.A.D.C.), which also involved a suit under the Longshoremen's and Harbor Workers' Compensation Act for compensation for the death of an employee, the court held that similar evidence was sufficient corroboration. The claimant there alleged that the employee had died of a cerebral hemorrhage, caused by his having struck his right

[5] Corroborative evidence need not be admissible under the technical rules of evidence but need only be such that a reasonable mind might accept it as adequate to support a conclusion. *E.g.*, *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 477; *Ellers* v. *Railroad Retirement Board*, 132 F. 2d 636 (C.A. 2); *National Labor R. Board* v. *Service Wood Heel Co.*, 124 F. 2d 470, 473 (C.A. 1); and *International Association of Machinists, etc.* v. *National Labor Relations Board*, 110 F. 2d 29, 35 (C.A.D.C.), affirmed, 311 U.S. 72.

temple against a filing cabinet in his employer's office. The deceased employee had made several declarations that the injury had occurred as claimed. The sole corroborating evidence was: (1) that on the date of his alleged injury, the deceased had come home ill with a visible wound; and (2) that there was a filing case in his office on which he could have injured himself. The court held that it was sufficient corroboration to show that the deceased manifested the symptoms of an accident on the date on which he said it occurred, and that the injury could have occurred in the way described.

Both the district court and the court of appeals found that there was substantial evidence in the record here to support the Deputy Commissioner's findings, and not merely a "scintilla" of evidence as petitioners claim (Pet. 13). Thus, further review is not warranted. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214; *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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